LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 25 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 25

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANT

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202
Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes, Certificates and Administrative Rulings Involved	3
Questions Presented	3
Statement	5
A. The Facts in This Suit	5
B. Factual Outline and History of Maryland's Subversive Activities Law	8
Summary of Argument	16
ARGUMENT	20
I. The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law	20
A. Maryland's Law and the "Certification" are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections*	20

PAGE

B. Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face, as applied, and as judicially construed, and both it and the required "Certification" are therefore invalid conditions or limitations on public employment 32

C. The definitional, oath and loyalty provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause 42

II. Loyalty oaths and provisions, including Maryland's, that are indiscriminately required of or imposed upon all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution 46

III. The Maryland Act and "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without

PAGE

affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law 52

IV. The required "Certification" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution 60

CONCLUSION 62

APPENDIX:

First Amendment, U. S. Const. 1a

Fifth Amendment, U. S. Const. 1a

Fourteenth Amendment, U. S. Const. 1a

Article 1, Section 10, U. S. Const. 2a

Article 85A, Md. Code Annot. (1957) 3a

"Certification of Applicant for Public Employment" 16a

Letter from Attorney General Finan to Governor Tawes (May 13, 1966) 17a

Compilation of State Loyalty Standards for Teachers 19a

Spangler v. Board of Regents (Docket No. 241, D. Ct. of Lancaster County, Nebraska, April 17, 1967) 24a

Gallagher v. Smiley, —— F. Supp. —— (Civ. Action No. 66-C-608, April 24, 1967) 27a

PAGE

Table of Authorities

Cases:

Adler v. Board of Education, 342 U. S. 485 .....26, 27, 47, 63
American Communications Ass'n v. Douds, 339 U. S. 382 .....24, 25
In re Anastoplo, 366 U. S. 82 .....47, 54
Aptheker v. Secretary of State, 378 U. S. 500 ....26, 32, 34, 38, 40, 53
A Quantity of Books v. Kansas, 378 U. S. 205 54

Baggett v. Bullitt, 377 U. S. 360 .....*passim*
Baggett v. Bullitt, 215 F. Supp. 439 (W. D. Wash. 1963) 28
Bantam Books v. Sullivan, 372 U. S. 58 54
Barenblatt v. United States, 360 U. S. 109 49
Bates v. Little Rock, 361 U. S. 516 .....18, 50, 51
Beilan v. Board of Education, 357 U. S. 399 47
Bell v. Maryland, 378 U. S. 226 .....43, 44
Bomar v. Keyes, 162 F. 2d 136 (2d Cir. 1947) 64
Bond v. Floyd, 385 U. S. 116 .....*passim*
Brush v. Board of Higher Education, —— Ore. ——, 422 P. 2d 268 (1966) 33

Carter v. Carter Coal Co., 298 U. S. 238 43
Commerce Oil Refining Corp. v. Minor, 170 F. Supp. 396 44
Connally v. General Construction Co., 269 U. S. 385 32
Cramp v. Board of Public Instruction, 368 U. S. 278 3, 32, 33, 34, 41, 48
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 .....20, 60

PAGE

DeGregory v. Attorney General of New Hampshire, 383 U. S. 825 ..... 49, 51, 53
Dennis v. United States, 341 U. S. 494 56
Dombrowski v. Pfister, 380 U. S. 479 ..... 17, 29, 34, 38, 40, 42
Dorchy v. Kansas, 264 U. S. 286 ..... 43, 44
Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943) .. 24

Elfbrandt v. Russell, 384 U. S. 11 ..... *passim*
Elfbrandt v. Russell, 97 Ariz. 140, 397 P. 2d 944 (1965) 29

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73 3
Freedman v. Maryland, 380 U. S. 51 56

Gallagher v. Smiley, —— F. Supp. —— (D. Col. April 24, 1967) 33
Ex parte Garland, 71 U. S. (4 Wall.) 333 ..... 20, 60
Garner v. Board of Public Works, 341 U. S. 716 ..... 40, 47, 48, 49, 61
Garrity v. New Jersey, 385 U. S. 493 ..... 46, 52, 59
In re Gault, 87 S. Ct. 1428 53
Georgia Conf. of AAUP v. Board of Regents, 246 F. Supp. 553 (N. D. Ga. 1965) 30, 33, 40
Gerende v. Board of Supervisors of Elections, 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam*, 341 U. S. 56 ..... *passim*
Gibson v. Florida Legislative Committee, 372 U. S. 539 ..... 34, 49, 51
Gojack v. United States, 384 U. S. 702 51
Griswold v. Connecticut, 381 U. S. 479 51

Hammond v. Frankfeld, 194 Md. 487, 71 A. 2d 482 (1950) 14

PAGE

Hammond v. Lancaster, 194 Md. 462, 71 A. 2d 474 (1950) 14
Heckler v. Shepard, 243 F. Supp. 841 (E. D. Idaho 1965) 33, 53, 54, 55
Huebeck v. City of Baltimore, 205 Md. 203, 107 A. 2d 99 (1954) 18, 43, 44, 45
Hurwitz v. Director's Guild of America, 364 F. 2d 67 (2d Cir. 1966), *cert. denied* 385 U. S. 971 33

Kennedy v. Mendoza-Martinez, 372 U. S. 144 54
Keyishian v. Board of Regents, 385 U. S. 589 ..... *passim*
Knight v. Board of Regents, —— F. Supp. ——, 35 U. S. L. W. 2774 (S. D. N. Y. 1967) 33
Konigsberg v. State Bar of California, 366 U. S. 36 ..... 47, 54
Konigsberg v. State Bar of California, 353 U. S. 252 47

Lamont v. Postmaster General, 381 U. S. 301 ..... 19, 49, 57, 59
Lanzetta v. New Jersey, 306 U. S. 451 32
Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N. W. 2d 605 (1955) 49, 51
Lerner v. Casey, 357 U. S. 468 47

Marcus v. Search Warrant, 367 U. S. 717 54

NAACP v. Button, 371 U. S. 415 40
National Can Corp. v. State Tax Com'n, 220 Md. 418, 153 A. 2d 287 (1959) 43
Nelson v. Los Angeles County, 362 U. S. 1 ..... 47, 54
New York Times Co. v. Sullivan, 376 U. S. 254 49
Nostrand v. Little, 362 U. S. 474 54
Nostrand v. Little, 58 Wash. 2d 111, 361 P. 2d 551 (1961) 54
Noto v. United States, 367 U. S. 290 ..... 25, 34, 35

PAGE

Opinion of the Justices, —— N. H. ——, 228 A. 2d 165 (1967) 33

Pedlosky v. Massachusetts Institute of Technology, —— Mass. ——, 224 N. E. 2d 414 (1967) 33, 45
Pennsylvania v. Nelson, 350 U. S. 497 .....11, 45
Poe v. Ullman, 367 U. S. 497 51

Railroad Retirement Board v. Alton R.R., 295 U. S. 330 43
Reed v. Gardner, 261 F. Supp. 87 (C. D. Calif. 1966) 33
Reitz v. Mealey, 314 U. S. 33 .....18, 44

Scales v. United States, 367 U. S. 203 .....25, 34, 35
Schneider v. Rusk, 377 U. S. 163 49
Shelton v. Tucker, 364 U. S. 479 .....2, 18, 34, 46, 48, 52
Sherbert v. Verner, 374 U. S. 398 .....49, 53
Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950) ....*passim*
Skinner v. Oklahoma, 316 U. S. 535 43
Slochower v. Board of Education of New York, 350 U. S. 551 53
Smith v. California, 361 U. S. 147 .....32, 56-57
Spangler v. Board of Regents, Docket No. 241, D.Ct. Lancaster County, April 17, 1967 33
Speiser v. Randall, 357 U. S. 513 .....3, 19, 49, 55, 56, 59
Spevak v. Klein, 385 U. S. 511 .....52, 59
Sweezy v. New Hampshire, 354 U. S. 234 .....3, 39, 49, 51

Thornhill v. Alabama, 310 U. S. 88 40
Torcaso v. Watkins, 367 U. S. 488 .....48, 53, 54

United States v. Brown, 381 U. S. 437 .....20, 25, 48, 61

PAGE

United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) 24, 25, 35
United States v. Lovett, 328 U. S. 303 60

West Virginia State Board of Education v. Barnette, 319 U. S. 624 53
Wieman v. Updergraff, 344 U. S. 183 ..... 48, 49, 54
Weiss v. Gardner, 386 U. S. 9 33
Weiss v. Gardner, 263 F. Supp. 186 (S. D. N. Y. 1966) 33
Whitehill v. Elkins, 258 F. Supp. 589 (D. Md. 1967) *passim*
Williams v. Standard Oil of Louisiana, 278 U. S. 235 44
In re Wisconsin Builders Supply Co., 239 F. 2d 649 (7th Cir. 1956) 44
Winters v. New York, 333 U. S. 507 32

Yates v. United States, 354 U. S. 298 25

Statutes:

Federal Constitutional Provisions:

Article I, Section 10, U. S. Const. 2, 4, 19, 60
Article II, Section 1 58
Article VI 58
First Amendment, U. S. Const. ..... *passim*
Fifth Amendment, U. S. Const. 18, 59
Fourteenth Amendment, U. S. Const. 1, 4, 18, 46

PAGE

Federal Statutes:

18 U. S. C. § 2385 11

28 U. S. C. § 1253 2

28 U. S. C. § 1343 2

28 U. S. C. § 2201 2

28 U. S. C. § 2202 2

28 U. S. C. § 2281 2

28 U. S. C. § 2284 2

The Landrum-Griffin Act, 29 U. S. C. §§ 401-531 61

42 U. S. C. § 1983 2

State Constitutional Provisions, Statutes, Administrative Rules and Certificates:

Art. 1, § 6, Maryland Constitution 23

Art. 15, § 11, Maryland Constitution 8, 22, 23

Art. 37, Maryland Declaration of Rights 22

Ch. 721 of the Laws of Maryland of 1947 8

Senate Joint Resolution No. 2, 1948 Laws of Md. 158 (1948 extraordinary session) 8, 44

1949 Laws of Maryland 96-97 (Preamble to Art. 85A) 9, 44

§ 3(c), Art. 10, Md. Code Annot. (1957) 15

Art. 85A, Md. Code Annot. (1957) ..... *passim*

§ 435, Art. 27, Md. Code Annot. (1957) 30

PAGE

§ 439, Art. 27, Md. Code Annot. (1957) 30

"Certification of Applicant for Public Employment" *passim*

Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 15

Rule Fourteenth, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 15

Ariz. Rev. Stat. § 38-231, subs. G, as amended 1961, Ch. 108, § 5 29

Rev. Code Wash. Ann. ch. 9.81 (1961) 27

Rev. Code Wash. Ann. Sec. 9.81.083 (1961) 27

Miscellaneous:

Bently Glass on Test Oaths, 46 AAUP Bulletin 290-291 (Autumn, 1960) 51, 57

Briefs and record in Gerende v. Board of Supervisors of Elections, 341 U. S. 56 24

Educational Freedom in an Age of Anxiety (Hullfish, ed., 1953) 49

Hyman, To Try Men's Souls (1960) 58

Interim Report of Constitutional Convention Commission: Maryland (May 26, 1967) 22

Internal Security and Subversion: Principal State Laws and Cases, a Study Prepared by the American Law Division, Legislative Reference Service, Library

PAGE

of Congress, for the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary United States Senate, 89th Cong., 1st Sess. (1965) 15

Israel, *Elfbrandt v. Russell: The Demise of the Oath?* 1966 Supreme Ct. Rev. 193 ..... *passim*

Konwitz, EXPANDING LIBERTIES (1966) 49

Lazarsfeld and Thielens, THE ACADEMIC MIND (1958) 49, 51

Leahy, *Loyalty and the First Amendment—A Concept Emerges,* 43 N. D. L. Rev. 53 (1966) 37, 48

MacIver, ACADEMIC FREEDOM IN OUR TIME (1955) 49

Morris, *Academic Freedom and Loyalty Oaths,* 28 Law and Contemporary Problems 487 (1963) 49

Morris, *Baggett v. Bullitt: Scienter & "Guiltless Knowing Behavior",* 1 LAW IN TRANSITION Q. 185 (1964) 33

Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 LAW AND CONTEMPORARY PROBLEMS 447 (1963) 49-50, 55

Prendergast, *Maryland: The Ober Anti-Communist Law* in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952) 9, 44, 51

REPORT OF THE COMMISSION ON SUBVERSIVE ACTIVITIES TO GOVERNOR WILLIAM PRESTON LANE, JR., AND THE MARYLAND GENERAL ASSEMBLY (January, 1949) 44

Starky, THE DEVIL IN MASSACHUSETTS (1950) 58

PAGE

Sutherland, STATUTORY CONSTRUCTION (3rd Ed. 1943) 42, 43

Thomas John Claggett, MARYLAND HISTORICAL MAGAZINE, Vol. XLVII (June, 1952) 133 58

Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212 (1966) 61

IN THE

Supreme Court of the United States

October Term, 1967

No. 25

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANT

Opinions Below

The opinion of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are reported at 258 F. Supp. 589. The opinions and the judgment and final order in this case are also set out in the Record at pp. 63-78.

Jurisdiction

This class action was instituted on August 19, 1966 under the First Amendment and Section I of the Fourteenth Amendment of the Constitution of the United States, un-

der Article I, Section 10, Paragraph 1 of the Constitution of the United States; and under Sections 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code. The court below was asked to pass on the constitutionality of Article 85A of the MD. CODE ANNOT. (1957), the Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17, and the "Certification of Applicant for Public Employment" required pursuant to it according to the interpretation of the certification requirement most recently made by the Attorney General of Maryland. The relief prayed for was an injunction against the Appellees, each of whom is either an official body or officer of the State of Maryland, from enforcing the statutes and rulings complained of, and, also "such other and further relief as to the Court may seem just and proper."

By decision filed on September 8, 1966, the District Court gave judgment for the Appellees and denied all relief requested by the Appellant. Notice of appeal was filed in the District Court for the District of Maryland on September 13, 1966. On November 15, 1966, the Jurisdictional Statement was filed in this Court and on February 13, 1967, this Court noted probable jurisdiction (R. 81).[1]

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Keyishian* v. *Board of Regents of New York,* 385 U. S. 589; *Baggett* v. *Bullitt,* 377 U. S. 360; *Shelton* v. *Tucker,* 364 U. S. 479;

[1] Citations to the printed Record in this case henceforth will be in the form of (R. page number).

Florida Lime and Avocado Growers, Inc. v. *Jacobsen,* 362 U. S. 73. And see, *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Speiser* v. *Randall,* 357 U. S. 513; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

Statutes, Certificates and Administrative Rulings Involved

The provisions of the law involved in this case are: Article 85A, Vol. 8A Md. Code Annot. pp. 4-10 (1957), the Maryland Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, and 17; the "Certification of Applicant for Public Employment" required of Appellant; and the May, 1966 ruling of the Attorney General of Maryland as to the scope of the certification requirement. Because of their length, the text of the statutory provisions, certificates, and rulings, involved are set out in the Appendix, *infra,* pp. 2a-18a.

Questions Presented

1. In the light of recent decisions of this Court, was the District Court correct in ruling that the "Certification of Applicant for Public Employment," which Appellant refused to execute, and the Maryland Subversive Activities Act of 1949, which requires execution of that Certification as a condition of public employment and which otherwise erects loyalty requirements, are insulated from constitutional attack by this Court's decision in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56 (1951)?

2. Are the "Certification" and the statute under which it is compelled unconstitutionally vague, uncertain and broad in violation of due process of law?

3. If the definitional, certification and other loyalty provisions of the Maryland statute are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

4. Do Maryland's loyalty "Certification," which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, and the Maryland statute's loyalty provisions unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

5. Do the Maryland statute and the "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Do the "Certification" and the statute pursuant to which it is required constitute a Bill of Attainder in violation of Article 1, § 10 of the United States Constitution?

Statement

A. *The Facts in This Suit*

This suit challenges the constitutionality of the Maryland Subversive Activities Act of 1949, Article 85A, Md. Code Annot. (1957), and particularly Sections 1, 10, 11, 13, 17, and the "Certification of Applicant for Public Employment" required pursuant to its provisions as a condition to public employment, and the ruling of the Attorney General of Maryland of May, 1966 which most recently interpreted the scope of this requirement.

Since in a motion to dismiss all facts well pleaded in the complaint are accepted as true, the facts in this case are as follows:

The Appellant herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland, and is engaged in teaching creative writing at the Johns Hopkins University in Baltimore and in writing works of fiction and of non-fiction. He is, furthermore, a practicing member of the Religious Society of Friends, known also as Quakers. The Appellees are Wilson Elkins, who is the President of the University of Maryland, and the Board of Regents of the University. They are fully and completely responsible for supervising, directing and otherwise controlling, so far as the University's personnel are concerned, the enforcement of the requirement under Sections 11 and 13 of Article 85A Md. Code Annot. (1957) that all applicants for employment with and all employees of the University execute as a condition to employment some certification of loyalty and particularly the "Certification of Applicant for Public Employment" that was required of Appellant (R. 5-6).

Pursuant to an understanding with representatives of the University of Maryland at College Park, Maryland, the Appellant executed a written contract for his appointment as a visiting lecturer in English during the academic year of 1966 to 1967. Under the terms of the contract, he was to be paid $7,000.00 on a ten month basis starting in September 1966; and he agreed to spend one day a week at the College Park campus each semester, teaching two creative writing classes in 75 minute sessions, and making additional conference time available for consultation with students (R. 5).

By a letter dated July 6, 1966, and signed by Dr. Murphy, the Appellant received the contract and certain additional papers, including what was denominated a "Certification of Applicant for Public Employment," which contained a loyalty test and which he was instructed had to be signed as a condition to his appointment (R. 5-6, 10-11). The Appellant executed the contract, and by letter of July 11, 1966, he mailed it to Dr. Murphy, declining in a separate letter enclosed therewith, however, to execute the "Certification." In his letter of explanation the Appellant offered to serve without pay pending the adjudication of the issues in this case (R. 6, 12, 60-62). Dr. Murphy by a letter of July 18, 1966, advised the Appellant that the University of Maryland would not accept his services without the required certification having been executed and filed by him (R. 6, 13-14).

On August 19, 1966, the Appellant filed suit in the United States District Court for the District of Maryland challenging the constitutionality, on the various grounds taken

up herein, of the Maryland Subversive Activities law and the required certification. In his complaint, the Appellant, whose teaching duties under the contract he had executed were not to commence for several weeks, requested a preliminary and permanent injunction, declaratory judgment, and "such other and further relief as to the Court may seem just and proper" (R. 9). A statutory three-Judge District Court was convened, and a hearing was conducted on September 1, 1966 on the State's motion to dismiss the complaint for failure to state a cause of action upon which relief could be granted. The State's motion was filed on August 31, 1966. On September 8, 1966, the District Court issued its order and opinion dismissing the complaint and resolving each of the constitutional issues the Appellant raised against him, primarily on the ground that this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, was controlling on the issues in this case even though, strictly speaking, *Gerende* directly involved only the candidates' oath requirement under Section 15, and not, as here, the employees' oath requirement under Sections 11 or 13 (R. 63-75). Judge Sobeloff, concurring specially, wrote a separate opinion in which he indicated his doubts as to the continued vitality of the *Gerende* decision, in the light of subsequent decisions of this Court, and in ending said "... despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*" (R. 77). Notice of Appeal was filed on September 13, 1966 (R. 78-81). On November 15, 1966, the Jurisdictional Statement was filed

in this Court and on February 13, 1967, this Court noted probable jurisdiction (R. 81).

B. *Factual Outline and History of Maryland's Subversive Activities Law*

By Chapter 721 of the LAWS OF MD. 1947, the General Assembly of Maryland proposed an amendment to the Constitution of Maryland by adding a new Section 11 to Article 15 thereof, which reads as follows:

> "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this State or any county, municipality, or other political subdivision of this State."

The proposed amendment was approved by a vote of the people of Maryland on November 2, 1948.

At a special session of the General Assembly of Maryland in 1948, Senate Joint Resolution No. 2 was passed, see 1948 LAWS OF MD. 158 (1948 Extraordinary Session), directing the Governor to appoint a committee on subversive activities to study the laws of the United States, and of the several states, and to formulate and prepare a legislative program for the protection of democratic principles of government and ideals and for the exposure and expurgation of subversive activities in the State of Maryland. Pursuant to this resolution, the Governor appointed a "Commission on Subversive Activities," with Frank B.

Ober, Esquire, as chairman. The report of the commission, covering 115 pages, was submitted to the Governor on September 30, 1948, with an attached draft of a proposed bill entitled, "Sedition and Subversive Activities". The legislature enacted the substance and most of the detail of the bill proposed by the commission and it became Chapter 86 of the Acts of 1949, now codified as Article 85A of the ANNOTATED CODE OF MARYLAND (1957). By Chapter 310 of the LAWS OF MD. 1949, Chapter 86 was declared an emergency measure, and took effect on the date of its passage, April 22, 1949. On the background of the law, see Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952). This law is popularly known as the "Ober Law" after the chairman of the Commission.

In a preamble to the Act, see 1949 LAWS OF MARYLAND 96-97, the General Assembly declared its findings, *inter alia*, that there existed a world-communist movement, under the domination of a foreign power, "having as its objective the establishment of totalitarian dictatorship in all parts of the world under its control"; that such dictatorship is "characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly and freedom of religion, and is a complete antithesis of the American constitutional form of government"; that other subversive organizations have similar objectives; that the methods of subversive persons and organizations "include treachery, deceit, infiltration into governmental, and other institutions, espionage, sabotage, terrorism, and other unlawful means"; that "the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons

entering the public employment of the State of Maryland or any of its political sub-divisions be definitely established"; and that "the Communist movement plainly presents a clear and present danger to the United States Government and to the [government of the State of Maryland and their political subdivisions] . . ."

Although made up of nineteen sections, the Ober Act, Article 85A, is an integrated whole establishing a regulatory scheme to guard against "Sedition and Subversive Activities."

Section 1 of Article 85A, directly at issue in this case, sets forth the definitions which form the basis for the entire scheme. Defined therein are the terms "organization," "subversive organization,"[2] "foreign subversive organization,"[3] "foreign government," and "subversive person".[4]

---

[2] "*'Subversive organization'* means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence."

[3] "*'Foreign subversive organization'* means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world fed-

Sections 2 through 9 all concern "Sedition," rather than "Loyalty" and have not been applied directly against the Appellant. These provisions, nevertheless, are relevant to this case and Appellant will contend under Point I. C., *infra*, that they too should fall. Section 2 makes it a felony "knowingly and willfully" to engage in certain defined "subversive" activities. Section 3 makes it a felony knowingly to remain or become a member of a "subversive organization". Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office, standing for election, or voting in any election in Maryland. Section 5 declares unlawful and provides for the dissolution of "subversive organizations" and "foreign subversive organizations". At least so far as these provisions deal with subversion of the United States Government, it is clear that they have been superseded by the Smith Act, 18 U. S. C. § 2385. *Pennsylvania* v. *Nelson*, 350 U. S. 497. See also, Commentator's note to Section 2 of Art. 85A, MD. CODE ANNOT. (1957).

Sections 6 through 9 deal with the appointment of an Assistant Attorney General to be "in charge of subversive activities"; the collection of evidence and information with respect to "subversion" and appointment of additional per-

---

erations, unions or governments to be effected through constitutional means."

"'*Subversive person*' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; *or who is a member of a subversive organization or a foreign subversive organization.*" (Emphasis supplied.)

sonnel for the task; the keeping of relevant records and reports, particularly "such records as may reflect on the loyalty of any resident of this State"; and the use of Grand Juries for purposes of inquiring into violations of the Article.

Sections 10 through 17 concern "Loyalty". Most of these provisions directly affect Appellant and inhibit the enjoyment of many of his most critical constitutional rights. Section 10 declares that "no subversive person, as defined in this article, shall be eligible for" public employment or appointment. Section 11 requires each governmental board, agency, or body which appoints, employs or supervises appointment or employment of public officials or employees to establish procedures for ascertaining that all such appointees or employees are not "subversive persons". "[T]eachers and other employees of any public educational institution in this State" are the only such appointees or employees given specific mention. In addition, the section provides that applicants "shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury". Section 12 authorizes employing authorities to dispense with "the inquiries prescribed in § 11; *other than the written statement to be executed by an applicant for employment* . . . as a prerequisite to the employment of any persons in the classification of laborers," upon a finding "that employment of persons as to whom there is reasonable cause to believe that they are subversive persons as defined in this article will not be dangerous to the health of the citizens or the security of the governments. . . ." (Emphasis supplied.)

Section 13 required every state employee employed as of June 1, 1949, "to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article". This quoted statement is then followed by the definition of "subversive person" given in Section 1. See *supra*, p. 11, note 4. The Section further provided that an employee who failed or refused "to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged". While earlier loyalty cards referred to Article 85A, without specification of a particular section, as their legislative authority, the "Certification of Applicant for Public Employment," demanded by the University officials in this case, states that it is required by this "Paragraph" 13 (R. 11). At the hearing below the Attorney General said that the loyalty certificates required by some other state agencies refer generally to Article 85A (R. 56). Authority for requiring the certification here at issue lies primarily under Section 11, but is also implied in Sections 12 and 13.

Section 14 provides that reasonable ground for believing a person is a "subversive person" is cause for discharge; it makes provision for administrative hearing and judicial review in such discharge cases. Section 15 requires candidates for election to any public office to file affidavits that they are not "subversive persons". Section 16 requires private institutions of learning receiving public funds to report on the procedures and efforts that they undertake to remain free of employees who are "subversive persons". Section 17 renders misstatements by public employees and applicants for public employment or appointment subject to statutory penalties of perjury. Section 18 is a standard

severability clause. Section 19 sets forth the short title of the Act.

Shortly after its passage, a number of suits were brought challenging the Ober Law on constitutional grounds. It was authoritatively construed by the Court of Appeals of Maryland and upheld against all constitutional attack. *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881; *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56. See also *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950); *Hammond* v. *Frankfeld,* 194 Md. 487, 71 A. 2d 482 (1950). On the appeal in the *Gerende* case, which involved the affidavit required of candidates for public office, this Court affirmed, relying upon its interpretation of the Court of Appeals of Maryland's construction of the Maryland statute in *Shub.* Specifically, this Court said:

> "We read that decision to hold that to obtain a place on the Maryland ballot a candidate need only make an oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. at ——, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirements. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *affirmed.*" *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57.

Notably, until recently the Court's understanding in *Gerende* was not even closely followed by the long succession of Maryland Attorneys General.[5] Up to May, 1966, after this Court's decision in *Elfbrandt* v. *Russell*, 384 U. S. 11, the certification approved by the Attorneys General required the oath-taker to certify "that I am not a subversive person as defined by law, namely . . ." (followed by the Language approved in *Gerende*). (See R. 35.) An Applicant for public employment also had to certify that he understood that his statement was subject to statutory penalties of perjury. After the *Elfbrandt* decision, the At-

[5] At the hearing before the District Court in this case, it developed that various oaths, some very broad, were and still are extracted by various agencies of the State of Maryland and its political sub-divisions, presumably pursuant to Article 85A. (See R. 57.) See especially § 3(c) of Article 10, MD. CODE ANNOT. (1957) (Qualification for admission to the Bar); Rule Second, Rules Governing Registration of Law Student and Admission to the Bar of Maryland, 9A MD. CODE ANNOT., p. 233 (1957), which says: "The application [for registration as a law student] shall also state that the applicant is not a subversive person as defined by the Subversive Activities Act of 1949." (These rules were adopted by the Court of Appeals of Maryland on June 10, 1955 and amended on January 16, 1958 and July 21, 1965, long after this Court's decision in *Gerende*. Rule Fourteenth, governing admissions on motion, was last modified on December 22, 1966, well after the filing of this suit, without any change in this requirement. See Daily Record, Baltimore, Aug. 1, 1967, p. 6, col. 4.) All application forms and the forms of supporting documents conform to these requirements. See *Internal Security and Subversion: Principal State Laws and Cases, a Study Prepared by the American Law Division, Legislative Reference Service, Library of Congress for the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate*, 89th Cong., 1st Sess. 197-199 (1965). Incredibly, an applicant for admission on motion must certify whether he has "ever been a subversive person as defined . . ." according to precisely the definition found in Art. 85A, § 1, quoted *supra*, note 4, and, as taken up *infra* under point I. A., declared unconstitutional in *Baggett* v. *Bullitt*, 377 U. S. 360. See *Internal Security and Subversion*, *supra*, at 199.

torney General modified his prescribed form for the certification by deleting the phrases: (1) "that I am not a subversive person as defined by law, namely" and (2) "I am not knowingly a member of an organization engaged in such an attempt". See Append. p. 16a, *infra*. It is the post-May, 1966 oath that Appellant was required, and declined to take (R. 11).

Summary of Argument

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, Art. 85A, MD. CODE ANNOT. (1957), which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain and broad in violation of due process of law.

A.

The "Certification" and the Subversive Activities Act are not protected from constitutional attack by this Court's decision in *Gerende* v. *Board of Election Supervisors*, 341 U. S. 56, which upheld Section 15 of the Act, requiring loyalty affidavits of candidates for state elected office, and upon which the District Court relied below. Subsequent decisions of this Court have destroyed the underpinnings of the *Gerende* decision and those of *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), upon which this Court relied in *Gerende*. Furthermore, this Court's recent decisions reveal that not only the "Certification," which is subject to perjury sanctions, but also the loyalty and definitional provisions of the underlying statute must now be reviewed and declared unconstitutional. See *Elfbrandt* v. *Russell*, 384 U. S. 11, *Keyishian* v. *Board of Regents*, 385 U. S. 589.

B.

It is clear that central to Maryland's statute are the terms "subversive person" and "subversive organization," Section 1, Art. 85A, defined in precisely the same fashion as they were in the Washington loyalty oath statute and the Louisiana Subversive Activities Law, which were copied from Maryland's statute. This Court declared these definitions to be unconstitutionally vague in the cases of *Baggett* v. *Bullitt,* 377 U. S. 360 and *Dombrowski* v. *Pfister,* 380 U. S. 479, because men of common intelligence must guess at the law's meaning and differ as to its application. These two decisions govern the present case. Further, the Maryland loyalty provisions, and the "Certification" are also unconstitutionally broad in that they do not limit their disabilities to those who engage in advocacy of action to violently overthrow government or whose membership in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government is " . . . accompanied by specific intent to further the unlawful goals of the organization or . . . is . . . active membership . . . ." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608; *Elfbrandt* v. *Russell,* 384 U. S. 11.

C.

Even though the Maryland Subversive Activities Act contains a standard severability clause, see Section 18, Art. 85A, the definitional and loyalty provisions of the law, which are unconstitutionally vague, uncertain and broad, are completely intertwined with the remaining provisions and necessary for carrying out the legislative purposes of the Act. Under Maryland law concerning severability, the entire Act, therefore, must fall. See, *e.g.,*

Huebech v. *City of Baltimore,* 205 Md. 203, 107 A. 2d 99 (1954). And, it is incumbent upon this Court to decide the severability question according to state law, in a case, such as this one, which was litigated through the federal court system. See, *e.g., Reitz* v. *Mealey,* 314 U. S. 33, 38-39.

II.

All loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for employment, are unconstitutional infringements of the First and Fourteenth Amendments' freedoms of expression, belief and association. And, when required of academic personnel, as Maryland's is, such oaths also violate academic freedom guaranteed by the First and Fourteenth Amendments. See *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603-604. These oaths may not be justified on the ground that they are conditions that may be imposed on the enjoyment of a privilege, public employment, that the state may withhold at its will; for this Court has rejected the principle "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents,* 385 U. S. at 605. Across-the-board loyalty oaths must be judged according to the principles that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524, and that repressive means of securing legitimate ends must fall if means less restrictive of First and Fifth Amendment rights are available. *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Keyishian* v. *Board of Regents,* 385 U. S.

589, 609. When judged according to these standards, across-the-board loyalty oaths, and particularly Maryland's, must fall.

III.

The Maryland Subversive Activities Act and the "Certification" in question, afford an applicant for public employment who declines to execute the "Certification" no opportunity for a hearing, even for the purpose of explaining his reasons for not executing the "Certification" or of getting a clarification of the requirement. In addition, as with all such non-disloyalty disclaimers, the "Certification" otherwise shifts onto the applicant the burdens of proving his loyalty and lack of subversiveness. This oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without any opportunity for hearing, requires them to make their declarations. The act and oath, therefore, are "at war with . . . the First Amendment," *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, and deny procedural due process of law. Moreover, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The "Certification" and the Maryland Subversive Activities Act constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. Together, the test oath and statute punish the Appellant

and others similarly situated, legislatively and without a judicial determination. In this fashion they deny employment, a substantial interest, to competent and qualified employees and applicants for employment because they exercise their good consciences, professional integrity and political rights. See, *e.g., United States* v. *Brown,* 381 U. S. 437; *Cummings* v. *Missouri,* 71 U. S. (4 Wall.) 277; *Ex parte Garland,* 71 U. S. (4 Wall.) 333.

ARGUMENT

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law.

A. *Maryland's Law and the "Certification" are not protected from constitutional attack by this Court's 1951 decision in* Gerende v. Board of Supervisors of Elections.

Judge Winter for the majority in the District Court below said, ". . . what the Supreme Court said in the *Gerende* case is determinative here" (R. 69).[6] It is Appellant's

---

[6] *But see* Isreal, *Elfbrandt* v. *Russell: The Demise of the Oath?* 1966 SUP. CT. REV. 193, 210, 210 n. 89 (Kurland ed.) (henceforth cited Isreal, *Demise,* 1966 SUP. CT. REV. 193) where it was observed that *Gerende* may be distinguishable on the ground that "the oath in *Gerende* was limited to officials with policy-making functions" or "that these officials [in *Gerende*] are elected." Professor Isreal, however, did not press the latter distinction and neither does Appellant who agrees that "there is nothing in the subsequent treatment of *Gerende* that indicates the Court considered this an im-

contention, however, that decisions of this Court subsequent to *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, have destroyed the underpinnings of that case and if this Court has not yet done so it should reconsider and overrule that decision.

During the argument below in this case, Judge Winter made the following comment: "Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required. I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own . . . ." (R. 35). Appellant respectfully agrees that the *Shub* decision cannot properly be read to support the restrictive interpretation of the oath requirement that was urged upon this Court in *Gerende* by the Attorney General of Maryland. Alternatively, it is Appellant's position that the interpretation accepted by this Court in 1951 is much less limited than initially thought and, when judged by current standards, the statute and oath requirement as interpreted are unduly vague, uncertain and broad.

The Plaintiffs in *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed*, 340 U. S. 881 and *Gerende* v. *Board of Supervisors of Elections*, 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam*, 341 U. S. 56, sought to run for public office in Maryland without filing the affidavits of loyalty required by Section 15 of the Ober Law. In *Shub*, where the Maryland Court of Appeals rendered its only

---

portant factor." *Ibid. But cf: Bond* v. *Floyd*, 385 U. S. 116. To the extent that the former distinction is relevant, see *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (by implication), it is taken up in the discussion of the defect of over-breadth under points I. B. and II, *infra*.

full opinion considering the Ober Law on its merits, the main ground for attack was that the Section required an oath of office in addition to the one provided by the Maryland Constitution, and was, therefore, invalid under Article 37 of the Maryland Declaration of Rights which prohibits the legislature from prescribing additional oaths of office. The Maryland Court of Appeals, however, viewed Section 15 of the Act as requiring not an oath but merely an affidavit of qualification for office, implementing Article 15, Section 11 of the Maryland Constitution which reads: "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any [public] office . . . ."[7] The plaintiffs in *Shub* contended that the affidavit required under Section 15 of the Act for candidates, identical to the oath prescribed in Section 13 for public employees, went far beyond Article 15, Section 11 of the Constitution, in that it encompassed committing, attempting to commit, advocating, abetting, or advising alteration of the government by peaceful revolution and also membership in foreign organizations the purposes of which are to overthrow or alter the government by means not involving force or violence.

---

[7] Notably, the proposed Draft Constitution of Maryland's recent Constitutional Convention Commission does not include a provision that is equivalent to Article 15, Section 11, but does, in effect, carry-over Article 37 of the existing Declaration of Rights. See INTERIM REPORT OF CONSTITUTIONAL CONVENTION COMMISSION: MARYLAND—1967 (May 26, 1967) 211-212. But it is by no means clear that public employees are protected from the "Certification" requirement by Art. 37 of the current declaration of rights or by the proposed provision; nor is it clear from the Court of Appeals' decision in *Shub* that Art. 15, § 11 was necessary for the Ober Law to be valid under the State constitution. See *Shub* v. *Simpson*, 196 Md. 177, 187-189, 76 A. 2d 332, 336 (1950).

Upholding the legislation, the Maryland Court of Appeals stated its view, consistent with its understanding of the test of "clear and present danger," which had been refined recently by the federal Courts of Appeals, see 196 Md. at 195, 76 A. 2d at 340 that:

> *"A person who advocates the overthrow of the Government of the United States, or of this State, through force or violence* could scarcely in good faith, take the constitutional oath of office prescribed by Article 1, Sec. 6, and the Legislature has taken pains to see that the name of any such unqualified person shall not appear on the ballot." 196 Md. at 190, 76 A. 2d at 337 (Emphasis supplied).

The Court then specifically held that the purpose of Article 85A, the Ober Law, was identical with and therefore not inconsistent with that of Section 11 of Article 15 of the Maryland Constitution, which purpose the court said was "to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub* v. *Simpson,* 196 Md. 177, 192, 76 A. 2d 332, 338 (1950) (Emphasis in original).

Having reconciled the Ober Law to the Maryland Constitution, the Maryland Court of Appeals also addressed the federal Constitutional questions.

> "These grounds [said the court] are that it [Article 85A] abridges the fundamental rights of freedom of speech, press and assembly, that it is vague and indefinite and therefore violates due process, that it is a bill of attainder, that it attempts to establish guilt by associa-

tion, and other similar contentions. It is contended that the act is basically inseparable in its provisions, and, therefore, it should be stricken down in its entirety." 196 Md. at 195, 76 A. 2d at 339.[8]

Responding to these arguments, the court said that "[t]he purpose of Chapter 86 [Article 85A], as shown by its title and throughout its provisions, is not to restrict freedom of speech or thought, nor does it do so." 196 Md. at 192, 76 A. 2d at 338. And relying upon the federal Court of Appeals' decisions in *Dunne* v. *United States,* 138 F. 2d 137 (8th Cir. 1943), *cert. denied,* 320 U. S. 790 and *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494; and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the Maryland court concluded that:

"We do not think it necessary to repeat what has been said in these cases. *We are unable to find that the statute before us, on its face, violates any of the fundamental rights of appellants, or that it is susceptible of an interpretation which makes it necessary for the courts to strike it down.* On the contrary, there is a presumption in favor of its validity, and there has been presented to us no argument which impairs or rebuts that presumption." 196 Md. 177, 195, 76 A. 2d 332, 340. (Emphasis supplied.)

---

[8] These various grounds were also pressed before this Court in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Statement as to Jurisdiction, therein (No. 577, Oct. Term 1950); *Transcript of Record,* therein; *Brief of Appellant,* therein, *Brief of Appellee,* therein. *But see, Baggett* v. *Bullitt,* 377 U. S. 360, 368-69 n. 7.

It is evident from the Maryland Court of Appeals' opinion that that court was of the view that it had not, by judicial construction, significantly limited or narrowed the terms of the statute as they appear on its face. First, this is the most reasonable interpretation of the words, italicized above, chosen by the court to declare that neither on its face nor by interpretation did the statute violate the federal Constitution. Second, this conclusion is compelled by the fact that the statute was held to be directed at persons who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . . " 196 Md. at 190, 76 A. 2d at 337, and "persons who are engaged in *one way or another* in the attempt to overthrow the government *by force or violence,*" 196 Md. at 192, 76 A. 2d at 338 (first emphasis supplied), without limitation of the scope and coverage of the statute to advocacy of action to violently overthrow government or *active,* knowing membership, in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government, with specific intent to further these unlawful goals. See also, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950), quoted *supra,* p. 24. Finally, this conclusion is made unmistakable by the Maryland court's reliance on the Circuit Court decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494, and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the holdings of both of which have since been significantly limited by this Court. See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *United States* v. *Brown,* 381 U. S. 437. See particularly, *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, where the Court said that in *Yates* it "made quite clear

exactly what all the above terms [of the Smith Act] do and do not proscribe: '[T]he Smith Act reaches only advocacy of action for overthrow of government by force and violence'"; *Keyishian* v. *Board of Regents,* 385 U. S. 589, 594-595, 599-600, 607-608; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500. Isreal, *Demise,* 1966 SUP. CT. REV. 193, 202.

This Court's most recent pronouncements make it quite clear that the *per curiam* decision in *Gerende,* based as it was on the decision of the Maryland Court of Appeals in *Shub,* does not bar re-consideration of Maryland's law and oath. *Keyishian* v. *Board of Regents,* 385 U. S. 589, is authority directly in point on this proposition. In *Keyishian* the State of New York argued that the Court was foreclosed from voiding various New York laws because of its earlier decision in *Adler* v. *Board of Education,* 342 U. S. 485, upholding some of these provisions. This Court, however, overruled New York's contentions on the grounds that, in *Adler,* it had not considered any challenge that the provisions in question were unconstitutionally vague and further that the Court had re-evaluated the constitutional doctrine of over-breadth and, consequently, had "since rejected the premises upon which" important aspects of the *Adler* decision "rested". 385 U. S. at 595, 606. In *Baggett* v. *Bullitt,* 377 U. S. 360, 368-369 n. 7, this Court similarly indicated that in *Gerende* it had not passed upon the contention that Maryland's statute was unconstitutionally vague. Moreover, just as the "constitutional doctrine[s] [have] developed since *Adler,*" 385 U. S. at 606, they have developed since *Gerende,* which preceded *Adler* by a year and which, as already noted and will be further elaborated, was based upon the same incorrect constitu-

tional doctrines. Further, as will be elaborated under Point II, *infra*, "constitutional doctrine which has emerged since that decision [*Adler*, but also *Gerende*] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605. This premise has also been rejected with respect to the right of an elected official to hold office, the precise interest at issue in *Gerende*. See *Bond* v. *Floyd*, 385 U. S. 116.

Despite *Gerende*, therefore, this Court's recent decisions now require that the certification demanded of the Appellant should be reviewed and then invalidated. The Court's decisions also make it clear that this is true as well of Maryland's underlying statutory provisions bearing upon the "loyalty" of public employees.

In *Baggett* this Court reviewed and declared unconstitutionally vague and uncertain Washington's subversive activities law, particularly its definitions of "subversive person" and "subversive organization," and the loyalty oath required by it. The Washington law was copied from Maryland's Ober Law and its essential provisions were identical to it. Rev. Code Wash. Ann. ch. 9.81 (1961). See *Baggett* v. *Bullitt*, 377 U. S. 360, 362-64; *Id.* at 382 (Clark and Harlan, *JJ.*, dissenting).[9] *Baggett* came to this Court

[9] There is an exception, insignificant here. The Washington Law expressly declared the Communist Party to be a subvervsive organization, Rev. Code Wash. Ann. Sec. 9.81.083; 377 U. S. at 363 n. 1. The District Court in the case at bar also found that "the Washington definition [of subversive organization] included a limitation, absent in the Maryland definition, that membership be knowing." (R. 70). However, in *Gerende* this Court was evidently of the view that precisely that limitation was incorporated into the Maryland law. 341 U. S. 56-57.

on appeal from the decision of a statutory three judge District Court. 215 F. Supp. 439 (W. D. Wash. 1963). The District Court had construed the Washington Law and oath requirement in conformity with the construction of the similar Maryland statute in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See 215 F. Supp. at 446 n. 8, 447 n. 16, 449 n. 24, 450. Nevertheless, this Court, finding the statute too vague, struck it down.[10]

Justice Clark, joined by Justice Harlan, in dissent lamented the passing of *Gerende,* saying that it "is overruled. . . ." 377 U. S. at 382. Justice Clark elaborated:

> "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende,* but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." 377 U. S. at 382 note.

In apparent response to Justice Clark the majority said that *Gerende* had merely upheld Maryland's oath and not its underlying statute, 377 U. S. at 368-69 n. 7. But as the Court held two years ago in *Elfbrandt* v. *Russell,* 384 U. S.

---

[10] The Court said: "Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this contention. . . ." 377 U. S. at 366.

11, a loyalty oath, no matter how innocuous on its face,[11] cannot be passed upon in isolation, and it must be read together with its underlying and authorizing statute. See also *Dombrowski* v. *Pfister,* 380 U. S. 479, 493-94 (1965).[12]

The point that the Maryland oath must be read and passed upon with the underlying statute is further illuminated when note is taken of the fact that on the "Certification of Applicant for Public Employment," now administered by the Appellees, is printed, "Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)," (R. 11). The conscientious person who, himself or by counsel, refers to and reads the authorizing law is confronted squarely with the statutory terms and definitions that in *Baggett* this Court declared unconstitutionally

---

[11] The Oath in *Elfbrandt* was in the following form:

"'State of Arizona, County of ——— I, ———————
(type or print name)
do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ——— (name of office) ——— according to the best of my ability, so help me God (or so I do affirm).' Ariz. R. Stats. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5." *Elfbrandt* v. *Russell,* 97 Ariz. 140, 397 P. 2d 944, 945 n. 2 (1965). Evidently, "the Arizona provision is also based on Maryland's widely copied 'Ober Act.'" Isreal, *Demise,* 1966 SUP. CT. REV. 193 n. 3.

[12] The Court there said: "The statutory definition of a 'subversive organization' . . . incorporated into the offense [under Louisiana law] . . . is substantially identical to that of the Washington statute which we considered in *Baggett* v. *Bullitt,* 377 U. S. at 362, 363 n. 1. *There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad.*" 380 U. S. at 493-94. (Emphasis supplied.)

vague, uncertain and broad on their faces. The oath in *Elfbrandt* v. *Russell,* 384 U. S. 11, quoted *supra* in note 11, contained a similar citation to the underlying Arizona statute. And with this as the only visible nexus between the oath and the statute, this Court would not read and pass upon the oath without the statute.

The Maryland certification has an additional nexus between the oath and the statute, not apparent on the face of the Arizona oath. It requires affiants to make the statement that: "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)" (R. 11). As Judge Sobeloff said below in his special concurrence, "I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, *for in the absence of a statute, there would be no authority for demanding any statement 'under penalty of perjury'*" (R. 75). (Emphasis supplied.)[13] See also, *Georgia Conf. of AAUP* v. *Board of Regents,* 246 F. Supp. 553, 555 (N. D. Ga., 1965) (Three Judge Court).

Further, it was never merely Maryland's certification that the Appellant contested. From the outset he contended that "[n]ot only the required 'Certification of Applicant for Public Employment' but also the statute, particularly . . . [Sections 1, 10, 11, 13 and 17], pursuant

[13] Article 85A, Section 17, expressly provides that the penalties of perjury shall apply to "[e]very written statement made pursuant to this article by an applicant for appointment or employment." Sections 11, 13 and 17 specifically provide that such statements "shall contain notice that [they are] subject to the penalties of perjury." Statutory perjury is defined by Section 435 of Article 27 of the MD. CODE ANNOT. (1957).

to which such certification is given, is unconstitutional" (R. 25). In these circumstances, the Appellant would have standing to challenge the Maryland statute even if there were an administrative decision to dispense with requiring the particular certification in question. In *Keyishian* v. *Board of Regents,* 385 U. S. 589, each of the appellants brought suit after notification "that his failure to sign the [Feinberg] certificate [demanded of him] would require his dismissal." 385 U. S. at 592.[14] The Court observed that shortly before the trial in *Keyishian,* "The Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment 'solely' because he refused to sign the certificate." 385 U. S. at 596. Nevertheless, the Court held that:

> "The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certificate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application." 385 U. S. at 596.

So it is with the basic claim of Appellant now before the Court, to whose case the *Keyishian* ruling squarely applies.

---

[14] The Court will recall, as in this case, the appellees then took steps to implement the notification. *Ibid.*

B. *Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face, as applied, and as judicially construed, and both it and the required "Certification" are therefore invalid conditions or limitations on public employment.*

No principles of due process are better established than those which deny government the power: (1) to enforce "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt,* 377 U. S. 360, 367; see also *e.g., Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Winters* v. *New York,* 333 U. S. 507; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connally* v. *General Construction Co.,* 269 U. S. 385, or (2) to enforce a law that has "an overbroad sweep," proscribing acts "which may not be proscribed" as well as acts "which legitimately may be proscribed." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 609; see also, *e.g., Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500. It is also well settled that these principles are most strictly applied to statutes having a potentially inhibiting effect on speech, for fear that "the free dissemination of ideas may be the loser". *Smith* v. *California,* 361 U. S. 147, 151 (vagueness); *accord, Keyishian* v. *Board of Regents,* 385 U. S. 589, 609 (overbreadth). Further, in recent years this Court has expressly and consistently ruled that when loyalty oaths, and the statutes pursuant to which they are made conditions to public office or employment, are unduly vague, uncertain and broad, they inhibit con-

stitutionally protected expression, belief, association and academic freedom and are therefore invalid. *Elfbrandt* v. *Russell*, 384 U. S. 11; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; see *Morris, Baggett* v. *Bullitt: Scienter & "Guiltless Knowing Behavior"*, 1 LAW IN TRANSITION Q. 185 (1964).[15] These decisions are squarely in point with the present case and, Appellant respectfully submits, they require that Maryland's certification and Statute be declared unconstitutional.

---

[15] With near unanimity during the last two years numerous state and inferior federal courts have also voided loyalty requirements, imposed on teachers or other academic personnel, on these or similar grounds. See *Heckler* v. *Shephard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court); *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553 (N. D. Ga. 1965) (Three Judge Court); *Brush* v. *State Board of Higher Education*, —— Ore. ——, 422 P. 2d 268 (1966); *Pedlosky* v. *Massachusetts Institute of Technology*, —— Mass. ——, 224 N. E. 2d 414 (1967); *Opinion of the Justices*, —— N. H. ——, 228 A. 2d 165 (1967); *Spangler* v. *Board of Regents*, Docket 241, D. Ct., Lancaster Cty., Neb., April 17, 1967, reprinted in Appendix, *infra*, at pp. 24a-26a; *Gallagher* v. *Smiley*, Civ. No. 66-C-608, U. S. D. Ct. Colo. April 24, 1967 (Three Judge), reprinted in Appendix, *infra*, at pp. 27a-30a; N. Y. Times, July 16, 1967, Sec. 1, p. 37, col. 5 (Texas oath for students, superseded by 1953 law, suit filed against that law); see also, *Hurwitz* v. *Directors Guild*, 364 F. 2d 67 (2d Cir.) *cert. denied*, 385 U. S. 971 (1966) (union's loyalty oath voided); *Reed* v. *Gardner*, 261 F. Supp. 87 (C. D. Calif. 1966) (Three Judge) (Medicare oath declared unconstitutional); *Weiss* v. *Gardner*, 386 U. S. 9 (1967), *vacating and remanding for dismissal as moot*, 263 F. Supp. 186 (S. D. N. Y. 1966) (Three Judge), upon the Solicitor General's representation that the government was not appealing from the injunction issued in *Reed, supra*, because of this Court's decision in *Elfbrandt; contra, Knight* v. *Board of Regents*, —— F. Supp. ——, 35 U. S. L. W. 2774 (S. D. N. Y. June 2, 1967) (Three Judge). For the Court's convenience, included in the Appendix, *infra*, pp. 19a-23a, is an annotated "Compilation of State Loyalty Standards for Teachers," which reveals the pervasiveness of these kinds of laws and requirements.

As pointed out earlier, the essential definitional and loyalty provisions of the subversive activities law of the State of Washington, declared unconstitutionally vague and uncertain in *Baggett* v. *Bullitt*, 377 U. S. 360, 367-370 are identical with and were in fact copied from Maryland's Ober Law. See also, *Keyishian* v. *Board of Regents*, 385 U. S. 589, 597-604; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Dombrowski* v. *Pfister*, 380 U. S. 479. Maryland's loyalty and definitional provisions, therefore, are also unconstitutionally vague.

Recently the Court also voided Arizona's loyalty oath for public employees and its accompanying statutory gloss, which applied criminal sanctions to mere knowing membership in an organization having as one of its purposes the violent overthrow of government. The Arizona scheme's defect was that it was overly broad, impinging on constitutionally protected freedoms of expression and association, for it applied even "to membership without the 'specific intent' to further the illegal aims of the organization . . ." *Elfbrandt* v. *Russell*, 384 U. S. 11, 19. See also *Aptheker* v. *Secretary of State*, 378 U. S. 500; *compare*, *Noto* v. *United States*, 367 U. S. 290, *with*, *Scales* v. *United States*, 367 U. S. 203; *cf. Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, 543-46; *Shelton* v. *Tucker*, 364 U. S. 479. In its most recent decision in this area, the Court held that the defect of overbreadth involved constitutional deprivation regardless of whether the sanction applied by the government was direct (criminal) or indirect (withholding of a benefit or interest). In *Keyishian* v. *Board of Regents*, the Court declared several provisions of New York Education and Civil Service Laws because of overbreadth and held that:

> "*Elfbrandt* and *Aptheker* state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." 385 U. S. 589, 607-608.

The same defect, overbreadth, resides in the Maryland statute, which erects both direct and indirect sanctions, as judicially construed in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Article 85A, Sections 1, 3, 10, 11, 13, 14 and 15 of the MD. CODE ANNOT. (1957).

The defects of overbreadth and vagueness are made particularly clear by the fact that in *Shub,* the Maryland Court of Appeals, expressly relied on the Second Circuit decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), without the limiting clarification provided by subsequent decisions of this Court.[16] The Maryland court thus ruled that the Maryland statute covers those who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . . ," 196 Md. at 190, 76 A. 2d at 337, without restricting coverage to advocacy of action to violently overthrow government, or *active* knowing membership, in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government, with specific intent to further

---

[16] See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8; see also Isreal, *Demise,* 1966 SUP. CT. REV. 193, 202, 211 n. 90.

these unlawful goals.[17] And this Court evidently recognized and approved the overly broad interpretation, by ruling acceptable the oath proffered by the Attorney General of Maryland, according to which the affiant attested that he was not "knowingly a member of an organization engaged in such an attempt". *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. at 57. The Court thereby approved an oath and statute that are invalid under current standards for they are "not restricted in scope to those who join [such an organization] with the 'specific intent' to further its illegal action . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 17; *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607-608. Moreover the Court thereby approved an oath and statute that, under current standards, suffers the "defect of vagueness," for they are "plainly susceptible of sweeping and improper application. [They] may well prohibit the employment of one who merely advocates the doctrine [of forceful overthrow of government] in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599-600.

"Out of an abundance of caution," (R. 38), according to the Attorney General of Maryland, immediately following the *Elfbrandt* decision, he deleted from the oath administered to applicants for positions with the University, the phrase "knowingly a member of an organization engaged in such an attempt". See Appendix, *infra,* pp. 17a-

---

[17] Professor Isreal accurately observed that: "there was nothing in the opinion of the Maryland Court of Appeals to suggest that a requirement of 'specific intent' has been read into the state statute." Isreal, *Demise,* 1966 Sup. Ct. Rev. 193, 210 n. 88.

18a. This deletion, compelled by *Elfbrandt*,[18] however, was to no avail; for the oath and the statute are still trapped between the rock of overbreadth and the whirlpool of vagueness.

The affiant is still required to certify that he is "not engaged in *one way or another* in the attempt to overthrow the Government . . . " (R. 11). (Emphasis supplied.) The emphasized phrase, also approved by this Court in *Gerende*, 341 U. S. 56, however is not self-defining. In fact, to determine what it means, one must turn to the authorizing statute and its judicial interpretation, for without a defining gloss, the phrase unquestionably suffers from just the defect of vagueness the Court found unconstitutional in *Baggett* v. *Bullitt*, 377 U. S. 360, 366-70 (1964),[19] and just the defect of breadth struck down in *Elfbrandt* v. *Russell*,

---

[18] One commentator observed that:

> "This oath, even though narrowly construed by the Maryland supreme [sic] court does not meet the requirements of the [*Elfbrandt*] Concept. It does not distinguish between types of memberships. It is true that the construction of the oath . . . does not limit it to those though being knowledgeable have some 'meaningful association' with the aims and activities of the 'subversive' organization."

Leahy, *Loyalty and the First Amendment—A Concept Emerges*, 43 N. D. L. Rev. 53, 74 (1966); see also Isreal, *Demise*, 1966 Sup. Ct. Rev. 193, 193 n. 3, 209-11, 238-39.

[19] It is noteworthy that in *Baggett* v. *Bullitt*, 377 U. S. 360, 368-69 n. 7, the Court left this phrase out when it quoted the terms of the oath that it said had been found to be acceptable in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56-57. As a matter of fact, in *Gerende*, the Court, quoting from the decision of the Court of Appeals of Maryland, included precisely this phrase in what the Court found to be the "acceptable" affidavit.

384 U. S. 11 and *Aptheker* v. *Secretary of State*, 378 U. S. 500, 510-14.[20]

But the statute and the judicial construction that has been placed upon it, do not sufficiently clarify the meaning of the phrase.[21] Quite the contrary, when, for example, asked by Judge Winter at the hearing below, the only definition the Attorney General of Maryland could put on the phrase "in one way or another," was to say:

> "I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way" (R. 41).

Appellant submits that if the phrase means anything less expansive than this circular and unconstitutionally vague definition, it could only mean advocating "the overthrow of the Government . . . through force or violence . . ." *Shub* v. *Simpson*, 196 Md. 177, 190, 76 A. 2d 332, 337, without limitation to advocacy of action to violently overthrow government or *active*, knowing membership with specific intent to

---

[20] See Isreal, *Demise*, 1966 SUP. CT. REV. 193, 210-211: "The oath applies to attempts 'in one way or another' to overthrow the government, and this might well require no more than advocacy itself, especially when it is remembered that the concept of advocacy used in this area is that of urging future action in language 'reasonably and ordinarily calculated to incite to such action.'"

[21] *Compare Keyishian* v. *Board of Regents*, 385 U. S. 589, 601: "We do not have the benefit of a judicial gloss by the New York Courts enlightening us as to the scope of this complicated scheme." Nevertheless, "This is not a case where abstention pending state court interpretation would be appropriate, *Baggett* v. *Bullitt* [377 U. S. 360], 375-379; *Dombrowski* v. *Pfister*, 380 U. S. 479, 489-490." *Id.* 385 U. S. at 601 n. 9.

further unlawful ends, and it is therefore still unconstitutionally broad and vague.[22]

Even assuming that the recent deletion from the Maryland oath is meaningful, and, also, that under Section 11 of Article 85A, the Attorney General had the authority to eliminate from the oath the phrase "knowingly a member of an organization engaged in such an attempt" and also has the authority to delete the phrase "in one way or another," it is Appellant's contention that the oath would still have to fail.[23] For, as discussed above, the recent decisions of this Court make it clear that the oath must be read and passed upon with its underlying and authorizing statute. Although the oath may possibly be within his control, the Attorney General has no authority to change the meaning of the judicially construed statute. As Justice Frankfurter said during the very term in which *Gerende* was decided:

> "The Attorney General did not give this assurance [in *Gerende*] as a matter of personal relaxation of a legal

---

[22] The failure of the *Shub* and *Gerende* decisions to clarify the meaning of the Maryland statute can further be seen in the fact that those administering the oath requirement have been unable to settle on a particular and clear certification. Until recently even the oath approved by the Attorney General to be required of applicants for public employment was cast in terms that were much broader than those found acceptable by this Court in *Gerende*. Further, broad pre-*Gerende* oaths are still required under some Maryland laws and by many government departments and subdivisions of Maryland. See, *e.g.*, note 5, *supra*. Notably, despite the Maryland court's ruling in *Shub* that they are not subject to the Ober Law, candidates for federal office were still being asked to execute a "loyalty" certification. See N. Y. Times, p. 60, col. 1, May 1, 1966.

[23] The Attorney General probably cannot lawfully recommend that the oath not be prescribed at all. Although Section 11 appears to vest discretion in the employing agency to decide whether to extract an oath, Sections 12 and 13 indicate that a "written statement," certification or oath must be extracted as a condition of employment. *Cf. Sweezy* v. *New Hampshire*, 354 U. S. 234.

requirement. He was able to give it on the basis of the interpretation that the Court of Appeals of Maryland, the highest court of that State, had placed upon the legislation." *Garner* v. *Board of Public Works,* 341 U. S. 716, 727 (Frankfurter, J. concurring).[24]

And when penalties of perjury are provided to enforce oath taking requirements, this Court has made it clear that the fact that the oath itself might be innocuous on its face will not insulate it from examination in the context of the statute authorizing it and providing penalties for its enforcement. *Elfbrandt* v. *Russell,* 384 U. S. 11.

Moreover, when penalties of perjury are provided, the Court has recently said that it will not rely on the fair-mindedness of prosecutors to limit otherwise unduly vague, uncertain and broad statutes requiring oaths, *e.g., Baggett* v. *Bullitt,* 377 U. S. 360 at 373-74; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-287, or otherwise impinging First Amendment rights, including academic freedom, see *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599-600; see also, *Dombrowski* v. *Pfister,* 380 U. S. 479, 488-94. And as the Court said in *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515, 517, the fact that a statute having an inhibiting effect upon First Amendment and other essential personal rights may have been constitutionally applied in the particular case does not insulate it from attack on its face. See also *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98; *NAACP* v. *Button,* 371 U. S. 415, 432-33.

---

[24] In *Georgia Conf. of AAUP* v. *Board of Regents,* 246 F. Supp. 553, 555 (N. D. Ga. 1965) the three judge court said: "The oath which the State School Superintendent has substituted for the oath prescribed in the 1935 statute has not been objected to by plaintiffs, but we say in passing that it seems to be without statutory basis."

To recapitulate, under the standards of unconstitutionality for vagueness and overbreadth refined in the Court's most recent decisions in this area, Maryland's Ober oath and many provisions of the underlying statute, which " . . . blankets all state employees, regardless of the 'sensitivity' of their positions," *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116, impinge substantially upon the academic and other First Amendment freedoms of the Appellant and the members of the class he represents. *Keyishian* v. *Board of Regents,* 385 U. S. 589. The statute and the "Certification," therefore, are and should be declared unconstitutional. First in the light of the four cases specifically dealing with such oaths and loyalty statutes,[25] the Maryland oath both standing on its own and when read with its underlying statutory gloss, is both unconstitutionally vague and broad. Second, the applicable loyalty provisions, Sections 10,[26] 11,[27] 12,[28] 13,[29] 14,[30] and 17,[31] which together with the oath and definitional provisions, constitute the complex regulatory scheme impinging directly on Appellant's rights, see *Keyishian* v.

---

[25] *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Baggett* v. *Bullitt,* 377 U. S. 360; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

[26] entitled: "Subversive person not eligible for governmental office." Appendix, *infra,* p. 10a.

[27] entitled: "Rules and regulations to determine loyalty—in general." Appendix, *infra,* pp. 10a-11a.

[28] entitled: "Same—Not applicable to laborers." Appendix, *infra,* p. 11a.

[29] entitled: "Statement of employees." Appendix, *infra,* pp. 11a-12a.

[30] entitled: "Discharge from office." Appendix, *infra,* pp. 12a-14a.

[31] entitled: "False statements constitute perjury." Appendix, *infra,* p. 15a.

Board of Regents, 385 U. S. 589, are all cast in the operative terms "subversive person" and "subversive organization". Those terms are defined in Section 1, see footnotes 2, 3, 4, *supra,* in precisely the same language that was declared to be unconstitutionally vague in *Baggett* v. *Bullitt,* 377 U. S. 360 and *Dombrowski* v. *Pfister,* 380 U. S. 479. Consequently, each of these provisions, as well as the definitions upon which each is founded, is unconstitutionally vague. Furthermore, since the term "subversive person" contemplates membership in "a subversive organization or a foreign subversive organization," see note 4, *supra,* without limitation to active membership or membership with specific intent to further the organizations' unlawful goals, the definitions and all of the other provisions are also unconstitutionally broad. *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11.

C. *The definitional, oath and loyalty provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause.*

Despite Section 18, of Article 85A, the severability provision in Maryland's Subversive Activities Law, the entire statute must fall. It is well established that severability clauses are to no avail when the valid and invalid portions of a statute are so inextricably intertwined, connected and interdependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others. On the contrary, when the provisions of a statute are so interrelated the conclusion is compelled that the legislature would not have done so. See, SUTHERLAND, STATUTORY CONSTRUCTION, Sections 2418, 2407, 2404 (3rd Ed., 1943). This is especially

true of statutes embodying criminal or penal provisions. See SUTHERLAND, *supra*, Section 2418.

The Maryland Court of Appeals has stated the test of severability in a number of alternative forms, involving the above-mentioned considerations. First, the test is: "... one of legislative purpose, namely: would the [legislature] have enacted the ... law if it had been aware that the ... [particular] provisions were invalid?" *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211, 107 A. 2d 99, 104 (1954); see also *National Can Corp.* v. *State Tax Com'n*, 220 Md. 418, 153 A. 2d 287, 298 (1959). Second, it requires that an entire statutory scheme be struck down when elimination of some provisions render the other provisions "impractical and useless without the invalid portions". *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211, 107 A. 2d 99, 104 (1954). Third, the court asks the question whether the invalid provision "... is so interwoven with the entire Act that the [remaining] provisions ... cannot stand without it." *National Can Corp.* v. *State Tax Com'n*, 220 Md. 418, 436, 153 A. 2d 287, 298 (1959). The federal tests of severability are precisely the same. See, *e.g.*, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312 *et seq.*; *Railroad Retirement Board* v. *Alton R. R.*, 295 U. S. 330, 361-362.

When, in the course of reviewing decisions of state courts, the Court declares a state provision unconstitutional, it customarily remands to the state court for determinations of severability. See *Bell* v. *Maryland*, 378 U. S. 226, 240-241; *Skinner* v. *Oklahoma*, 316 U. S. 535, 543; *Dorchy* v. *Kansas*, 264 U. S. 286, 289-91. However, even when reviewing state court decisions this Court has consistently declared that "in the absence of a controlling state decision, [it] may, in passing upon the claim under federal

law, decide also the question of severability. But it is not obliged to do so." *Dorchy* v. *Kansas,* 264 U. S. 286, 291, quoted with approval in *Bell* v. *Maryland,* 378 U. S. 226, 240. On the other hand, "In cases coming from the lower federal courts, such questions of severability, must be determined by this Court," *Dorchy* v. *Kansas,* 264 U. S. 286, 291; *Williams* v. *Standard Oil of Louisiana,* 278 U. S. 235, by applying the severability rules of the state. See, *e.g., Reitz* v. *Mealey,* 314 U. S. 33, 38-39; *In re Wisconsin Builders Supply Co.,* 239 F. 2d 649, 656-657 (7th Cir. 1956); *Commerce Oil Refining Corp.* v. *Minor,* 170 F. Supp. 396, 405 (D. R. I. 1959), applying the *Heubeck* formula. It is, therefore, appropriate for this Court to resolve the severability question posed in this case. The issue being a purely legal one of legislative purpose, nothing would be gained by remanding the case to the federal district court for disposition.

When the appropriate federal and state tests of severability are applied to Art. 85A, it is clear that the entire statute must fall. Article 85A is a unified scheme comprised of interdependent provisions, including criminal and penal ones, to control subversive activities in Maryland. See "Statement B. Factual Outline and History of Maryland's Subversive Activities Law," *supra,* pp. 8-16; Maryland Senate Joint Resolution No. 2, Special Session, 1948 Laws of Maryland 158 (1948 Extraordinary Session); Report of the Commission on Subversive Activities to Governor William Preston Lane, Jr., and the Maryland General Assembly (January, 1949); 1949 Laws of Maryland 96, *et seq.* (setting forth the Act's preamble); see also, Prendergast, *Maryland: The Ober Anti-Communist Law,* in The States and Subversion 140 (Gellhorn, ed. 1952). As elaborated under Point I. B. of the

Argument, *supra*, Section 1, the definitions section, and Sections 10-14, and 17, which impose the certification and loyalty requirements on the Appellant and the others in the class he represents, are unconstitutionally vague, uncertain and broad. The definitions section, however, is at the heart of Maryland's statutory scheme; for the remaining significant provisions all depend on and make reference to these definitions, which constitute a major constitutional defect. See Sections 2(d), (e),[32] 3, 4, 5, 6, 9, 14, 15, 16. Once Section 1 is struck down, there is very little of the interwoven statute than can possibly avoid infection. Certainly, so little would be left that the Legislature would not "have enacted the law if it had been aware that the . . . [tainted] provisions were invalid." *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211-12, 107 A. 2d 99, 104 (1954). See also, *Pedlosky* v. *Massachusetts Institute of Technology*, —— Mass. ——, 224 N. E. 2d 414, 416 (1967), where the Supreme Judicial Court of Massachusetts, ruling a loyalty oath, and the entire statute that provided for it, invalid, held: "We have no way of knowing whether the Legislature would have enacted c. 71, §30A without the provision which we conclude to be invalid. We are unable to decide that these provisions are separable."

---

[32] Much of what remains in Section 2, pertaining to seditious offenses, is preempted under this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497; see commentator's note to Section 2 of Art. 85A, Md. Code Annot. (1957). Moreover, this Court has ruled that the word "sedition," which is used to entitle and describe Sections 2 through 9 of Art. 85A, Md. Code Annot. (1957), is unconstitutionally vague. *Keyishian* v. *Board of Regents*, 385 U. S. 589, 597-600.

II.

Loyalty oaths and provisions, including Maryland's, that are indiscriminately required of or imposed upon all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution.

The indiscriminate requirement of a loyalty oath as a condition of public employment violates the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution by unduly infringing upon the protected freedoms of expression, conscience, belief, religion, association, and academic freedom. See *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116.

The case at bar differs fundamentally from most past cases decided by this Court dealing with related areas. One significant distinction is that this case does not involve any orderly inquiry or questioning by state officials seeking relevant information.[33] The Appellant has not been asked to specify, particularize, elaborate, discuss or

[33] It requires no elaboration that there are limitations, in the interest of the First Amendment, on even this kind of state activity, see *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608, and that repressive means of securing legitimate ends must fall if means less restrictive of First Amendment interests are available. See *Shelton* v. *Tucker,* 364 U. S. 479. Further, the limitations of the Fifth Amendment's privilege against self-incrimination also need not be elaborated here. See *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511.

even present facts or data bearing on his fitness as a teacher.[34] What he is required to do is to make one and only one response to a question that assumes general irresponsibility—and the correct answer has been prescribed by the legislature. Failure to answer or to give the prescribed one has automatically barred the Appellant from teaching at the University of Maryland despite the fact that he would have been a valuable addition to the faculty of the University.

This Court's recent depreciation of *Adler* v. *Board of Education*, 342 U. S. 485—see generally *Keyishian* v. *Board of Regents*, 385 U. S. 589—leaves *Garner* v. *Board of Public Works*, 341 U. S. 716 as the only significant precedent in which an across-the-board loyalty oath provision seemed to be upheld. *Garner*, however, is now weak authority. First, it may be in direct conflict with the Court's decisions both in *Keyishian* v. *Board of Regents* and in *Elfbrandt* v. *Russell*, 384 U. S. 11. The statute in *Garner* denied employment to any person who within five years had been a knowing member of any organization that "advised, advocated, or taught the overthrow by force or violence" of the state or federal government. 341 U. S. at 717-718. Clearly, therefore, the statute would exclude from public employment knowing members who were not active or who

[34] The lack of any legitimate intention to gather information from particular persons dealing with their competency distinguishes this case from *Beilan* v. *Board of Education*, 357 U. S. 399. It also distinguishes this case from such cases as *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastoplo*, 366 U. S. 82. In addition, none of these five cases involved school teachers. The first two involved other kinds of municipal employees and the last three involved admission to the Bar. The significance of this additional distinction is taken up *infra* in the text.

lacked the "specific intent" to further the organization's unlawful aims, and is not acceptable under the *Elfbrandt* and *Keyishian* decisions. See Isreal, *Demise,* 1966 SUP. CT. REV. 193, 211-213; Leahy, *Loyalty and the First Amendment—A Concept Emerges,* 43 N. D. L. Rev. 53, 74-75 (1966). Second, the *Garner* decision also relied heavily on an understanding of the prohibition against Bills of Attainder that no longer has vitality. See *United States* v. *Brown,* 381 U. S. 437, discussed *infra* under Point IV.

Third, *Garner* is further not dispositive of the present case because it was decided under the now discredited doctrine that public employment is a privilege as opposed to a right. The great growth of government activity, the multiplication of the categories of people in government employment and the ever increasing absolute and relative number of people on federal, state and local government payrolls dictate the reality that government employment cannot be treated in law as a mere privilege. Indeed, in a significant line of cases since *Garner,* the Court has recognized this fact of our social, political and economic life. And in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 605, the Court unequivocally rejected the doctrine "that public employment including academic employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." See also, *Elfbrandt* v. *Russell,* 384 U. S. 11; *Baggett* v. *Bullitt,* 377 U. S. 360; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Torcasco* v. *Watkins,* 367 U. S. 488, 495-96; *Shelton* v. *Tucker,* 364 U. S. 479; *Weiman* v. *Updegraff,* 344 U. S. 183, 192.[35] And when the principle of affording con-

[35] In these and additional cases, the Court has disclosed that unconstitutional conditions may not be interposed on the enjoyment of interests that traditionally had been classified as mere "privi-

stitutional protection to persons seeking to obtain or retain public employment is viewed in the light of the Court's increasing emphasis on the freedoms protected by the First Amendment, see, *e.g.*, *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, freedoms upon which across-the-board loyalty oaths or statutory provisions encroach so dangerously, it becomes apparent that the basis for *Garner* has been wholly removed.

Aside from *Garner's* lack of continued vitality, it has an important difference from the case at bar. The present case, brought by a teacher, presents issues of freedom of speech and conscience in one of the most significant and sensitive contexts, that of academic freedom. This court has long recognized the important constitutional dimension of academic freedom. See, *e.g.*, *Barenblatt* v. *United States*, 360 U. S. 109, 112; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250; *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (Frankfurter, J. concurring). See also, *e.g.*, EDUCATIONAL FREEDOM IN AN AGE OF ANXIETY (Hullfish, ed., 1953); KONVITZ, EXPANDING LIBERTIES 86-108 (1966); MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); LAZARSFELD AND THIELENS, THE ACADEMIC MIND (1958); Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW AND CONTEMPORARY PROBLEMS 487 (1963); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY

---

leges," evincing a general breakdown in the conceptualistic "privilege-right" dichotomy. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301; *Schneider* v. *Rusk*, 377 U. S. 163; *Sherbert* v. *Verner*, 374 U. S. 398; *Speiser* v. *Randall*, 357 U. S. 513; see also, *e.g.*, *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied*, 350 U. S. 882.

PROBLEMS 447 (1963). The Court has, in fact, clearly recognized and given protection to academic liberty, which is at the core of the First Amendment. In *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603, the Court specifically held that:

> "Our Nation is deeply committed to safeguarding academic freedom, which is the transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is no where more vital than in the community of American schools.'"

Thus coming out of that Amendment is a preferred position for intellectual freedom. Unjustified encroachment on this freedom or liberty by such requirements as are provided by Article 85A cannot be tolerated and are clearly unconstitutional.

The earlier cases upholding across-the-board loyalty tests must also be viewed in the light of the development into an inescapable principle that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524.[36] It is now clear that in these cases it is the state which must carry the

---

[36] Notably, this was not the test applied by the Maryland Court of Appeals in *Shub* v. *Simpson*, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950). In upholding the Ober Law, the Maryland court viewed it through "a presumption in favor of its validity".

burden of showing a substantial relationship between its regulation, prohibition or demand and a subject of overriding and compelling state interest. *E.g., Gojack* v. *United States,* 384 U. S. 702; *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825; *Gibson* v. *Florida Legislative Committee,* 372 U. S. 539; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *cf. Griswold* v. *Connecticut,* 381 U. S. 479.

Although *Bates, Gojack, DeGregory, Gibson* and *Sweezy,* all dealt with legislative investigations, the principle they established, as to state's burden of showing compelling and subordinating interests to impinge First Amendment rights, is equally applicable to the realm of loyalty oaths. *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied,* 350 U. S. 882.

During the fifteen years that Maryland has had its Ober Law and oath, the state has prosecuted no one for subversive activities and no one has been discharged as a subversive. *Cf. Poe* v. *Ullman,* 367 U. S. 497. Several conscientious people have been denied employment or discharged because they refused to execute the test oath. See *e.g.,* Prendergast *Maryland: The Ober Anti-Communist Law,* in THE STATES AND SUBVERSION (1952, Gellhorn, ed.) at 140, 169-170; *Bently Glass on Test Oaths,* 46 AAUP BULLETIN 290-291 (Autumn, 1960). No doubt many other conscientious and qualified persons have decided not to enter the state's employ because they abhor test oaths—much to the state's loss. Weighing the ineffectiveness of the Ober Law and oath against the tragically inhibiting effect of such oaths and laws, particularly with respect to teachers, see, *e.g., Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; LAZARSFELD AND THIELENS, THE ACADEMIC MIND 84-85, 92-112, 192-217, 240, *passim*

(1958), on the preferred First Amendment freedoms, and considering that the state can achieve its legitimate ends in less stultifying ways, *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Keyishian* v. *Board of Regents;* 385 U. S. 589, 609, for example through the ordinary criminal processes, or perhaps through systems of specific inquiry when reasonable grounds exist for questioning loyalty, *but cf. Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511, the conclusion is compelled that oaths such as Maryland's, and the statutes that require them, "which blankets all state employees, regardless of the 'sensitivity' of their positions," *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116, are unconstitutional conditions on public employment.

III.

The Maryland Act and "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law.

Under Article 85A, upon refusing to execute the required "Certification of Applicant for Public Employment," the Appellant (and all others similarly situated) was automatically rendered ineligible for public employment. The statute makes no provision for a hearing at which the Appellant would be afforded an opportunity to explain or defend his reason for refusing to execute the oath or to get

a clarification of the requirement. See *Heckler* v. *Shephard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge); *cf. Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (by implication); *In re Gault*, 87 S. Ct. 1428. Numerous circumstances can be conceived, moreover, which would cause a person to refuse to execute the oath, required under this statute, and which would in no way reflect on the person's loyalty or fitness for the job. For example, a person might be associated with a "subversive organization" or "in one way or another engaged in the attempt to overthrow the Government" for purposes of counter-espionage or for scholarly or other field study. *Compare, e.g., Aptheker* v. *Secretary of State*, 378 U. S. 500, 511-12; *Baggett* v. *Bullitt*, 377 U. S. 360, 367-70; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 600-601. In addition, as is the case at hand, a person might refuse to execute this oath on conscientious grounds or because he finds it offensive or insulting. See, *e.g., Torcaso* v. *Watkins*, 367 U. S. 488; *Sherbert* v. *Verner*, 374 U. S. 398; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *cf., e.g., DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825.

In *Slochower* v. *Board of Education of New York*, 350 U. S. 551, 559, the Court said:

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

Accord, Heckler v. *Shepard,* 243 F. Supp. 841, 845-846 (E. D. Idaho, 1965) (Three Judge Court); see also, *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608-609; *Nelson* v. *Los Angeles County,* 362 U. S. 1, 8 n. 5; *Nostrand* v. *Little,* 362 U. S. 474, 475, *on remand,* 58 Wash. 2d 111, 361 P. 2d 551, 566-567 (1961), *appeal dismissed, per curiam,* 368 U. S. 436; *Baggett* v. *Bullitt,* 377 U. S. 360, 384 (Clark and Harlan, *JJ.,* dissenting); *Whitehill* v. *Elkins,* 258 F. Supp. 589, 597-98 n. 1 (1967) (Sobeloff, *J.,* concurring); *cf. Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. And in recent cases concerning control of obscenity, the Court has further stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See, *e.g., A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Bantam Books* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717. *Cf. Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144.

Maryland's loyalty oath and the statutory provisions pursuant to which it is required as a condition to public employment may, although it is unlikely, exclude some disloyal or otherwise unfit employees, but it certainly excludes loyal and fit persons who are highly conscientious and sensitive, without according them any opportunity to explain their refusals to execute the oath. Such indiscriminate classification of the innocent with knowing activity offends due process of law. *E.g., Wieman* v. *Updegraff,* 344 U. S. 183; *Elfbrandt* v. *Russell,* 384 U. S. 11. A meaningful opportunity must be afforded an employee, or a potential employee,[37] *cf. Torcaso* v. *Watkins,* 367 U. S. 488;

[37] In *Keyishian* v. *Board of Regents,* 385 U. S. 589, 592, the Court noted that "Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate." Nevertheless his appeal was heard and decided.

Bond v. *Floyd*, 385 U. S. 116; *Murphy, Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY PROBLEMS 447, 481-484 (1963) at least to prove his fitness despite his refusal to take the oath. See, *e.g.*, *Slochower* v. *Board of Education of New York*, 350 U. S. 551; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court). No such opportunity is provided the applicant for employment under Maryland's Subversive Activities Law of 1949. See Article 85A, Sections 11 and 13.

In *Speiser* v. *Randall*, 357 U. S. 513, this Court struck down a California oath which was required before property owners could qualify for a tax exemption. The Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer [it was] . . . a violation of due process of law." 357 U. S. at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," *ibid.*, namely, to execute the oath as a condition of obtaining a tax exemption.

Speiser applies to this case in at least two ways. On the one hand, the Appellant here has been required, as the appellants were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive the Appellant of due process because, as pointed out above, the Maryland Subversive Activities Law does not offer any hearing to an applicant who declines to execute the oath or who desires a clarification of its meaning. There can be no doubt of the burden of free expression in this case. Sec-

ondly, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss or refusal of employment, which achieve the same constitutionally forbidden result: the deterrence of free expression which was disallowed in *Speiser*. In that case, the Court stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." 357 U. S. at 526.

The philosophy of the *Speiser* decision was followed by the Court in *Freedman* v. *Maryland,* 380 U. S. 51, where it was held that the burden of going forward with the evidence and of persuasion that a motion picture is censorable must be placed on the censor. *Cf.* also, *Smith* v. *Cali-*

fornia, 361 U. S. 147. The same basic problem was also handled by this Court in *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, where the Court held that the requirement that " . . . the addressee in order to get his [allegedly foreign political propaganda] mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights."

The provision and oath in this case are particularly insidious in that the oath-taker is put to the odious and impossible task of declaring, and if necessary, proving a negative, *i.e.,* that he is *not,* in effect, disloyal. See *Bently Glass on Test Oaths,* 46 AAUP BULLETIN 290-291 (Autumn, 1960) (Letter of a distinguished Johns Hopkins University Scientist explaining to Maryland's Governor why he would not execute the Ober oath as a condition to his appointment to a state advisory commission).[38] Such oaths and

---

[38] Historically, oaths of this character have been peculiarly distasteful to Marylanders, as events attending the War Between the States demonstrate. On September 17, 1861 a large number of Maryland officials, including nineteen members of the State Legislature were arrested "on suspicion of disloyalty" and dispatched to a number of Federal prisons. By and large no charges were placed against these men and no very specific reasons were given for this extreme action. An apparently unexpected public furor over these arrests promptly made the whole episode politically embarrassing to the administration. A test oath being used for a variety of purposes at the time appeared to be a solution: Anyone willing to take the oath was to be released. The great majority of imprisoned Maryland officials refused in spite of the damage to health and fortune and the loss of reputation they were suffering. Their position was firm: They had done nothing to justify their treatment; there was no reason in justice or principle why they should be singled out for any special burden or required, by swearing or otherwise, to demonstrate their loyalty by means not required of other citizens.

"And here was the heart of the matter, for what most of the nonjurors were objecting to in the oath requirement was that

inquiries are relics of the Salem Witch Trials, see, *e.g.*, STARKEY, THE DEVIL IN MASSACHUSETTS (1950), and earlier abominations. Unlike simple and affirmative declarations to support the Constitution that may be required of elected and high appointed officials and possibly of others in especially sensitive positions, see *Bond* v. *Floyd*, 385 U. S. 116; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (by implication), they have no textual basis in the federal Constitution. *Compare* U. S. Const., Art. II, §1, ¶8; Art. VI, ¶3.

Maryland's loyalty oath, and the statute under which it is required, as all such negative disclaimer oaths and statutes, by their very nature place the burdens of persuasion and proof onto Appellant, and others similarly situated, necessarily resulting in an undue deterrence of speech which the Constitution makes free and also a subversion

---

in taking it the prisoner assumed in the public eye an admission of guilt. After months in jail, still ignorant of precisely why they had been sent there in the first place, despite filth and poor food, rheumatism and distraught families, most of the Maryland men were ready to stay in prison rather than imply by taking the oath that their incarceration had been just." HYMAN, TO TRY MEN'S SOULS 150-51.

The principle was simply and poignantly expressed by Thomas John Claggett, a member of the Legislature, in a letter to his brother-in-law. Claggett was an uncomplicated man, a farmer whose only offense had been election to the State Legislature at a difficult time.

"Until recently, I knew that no one could be released from here however good his case or influential his friends without taking an oath. I had already taken an oath to support the Constitution and laws of the United States which I had not violated or intended to violate. I did not wish to give countenance to the imputation that I had done so either by taking an oath (which other citizens of Maryland were not required to take) or in any other way." *Thomas John Claggett*, MARYLAND HISTORICAL MAGAZINE XLVII (June, 1952) 133.

of the Fifth Amendment's privilege against self-incrimination. The Maryland scheme presumes the guilt, and non-employability of all persons, presuming either that they advocate the prohibited doctrines or that they are mere knowing members of the prohibited organizations or that they are active and violent revolutionaries. If and only if an affiant comes forward and executes the expurgatory oath may he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and disloyal. In other words, the oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without opportunity for hearing, requires applicants to make their declarations which may subject them to criminal sanction. This act and oath therefore, are "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment," *Lamont* v. *Postmaster General,* 381 U. S. 301, 307; see also, *Keyishian* v. *Board of Regents,* 385 U. S. 589, and also the Fifth Amendment, see *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511. And, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The required "Certification" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.

The provisions of Article 85A and oath given pursuant to it constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. The oath in question is a test oath, punishing Appellant and others similarly situated, legislatively without any adjudicatory process. The oath functions to deprive otherwise fully qualified and competent employees and applicants for employment of their employment, good consciences, professional integrity and political rights.

In *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 320, the Court held: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ." and that statutory or state constitutional provisions having that effect constituted Bills of Attainder. At issue, and struck down, in the particular case were state constitutional provisions that required the taking of a test oath as a condition of, among other things, holding public office or employment or voting. See also *Ex parte Garland*, 71 U. S. (4 Wall.) 333. In *United States* v. *Lovett*, 328 U. S. 303, denial of compensation for federal employment was also held a sufficient deprivation to invalidate a statute as a Bill of Attainder.

It is true that the Court has more recently several times rejected the attainder argument in loyalty oath cases. *E.g.*,

Garner v. *Board of Public Works*, 341 U. S. 716, 722-23. But recently there has been considerable change in the law relating to Bills of Attainder. In *United States* v. *Brown*, 381 U. S. 437, the Court struck down the provisions of the federal Landrum-Griffin Act which made it criminal for Communists to hold leadership positions in labor unions. Whatever may have been the purpose of the disqualification, and despite the absence of any disqualification of named persons, the Court found the whole scheme violative of the attainder clause of the Constitution. The relevance of that case to the present one is significant. After a careful review of the ingredients of the Bill of Attainder decisions, one commentator recently concluded that disclaimer-type loyalty oaths, viewed in the contexts of their authorizing statutes, raise serious attainder problems:

> "Such oaths contain the three elements necessary for a finding of a bill of attainder. The individuals subject to the sanctions of such oaths are identified with the required specificity, since it is only members of politically unpopular organizations who suffer the deprivations prescribed under the oath. The sanction imposed—disqualification from a particular job—is punishment appropriate in a bill of attainder context. And the sanction is imposed automatically, without judicial intervention. The person who cannot truthfully subscribe to the oath is denied employment." Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 250-251 (1966).

Thus the fact that criminal punishment does not follow is no longer dispositive of the attainder question; a loyalty

test which carries the sanction of loss or denial of employment may be just as much a Bill of Attainder as one which imposes the sanction of imprisonment or loss of life. Although this Court has not yet invalidated a loyalty oath on attainder grounds, there has been no warrant for this Court to reach the question in any of its recent cases. But any oath which passes muster against other constitutional attacks, must today withstand additional scrutiny on attainder grounds. The Ober oath and its authorizing statute cannot, as we have already argued, survive the other constitutional arguments raised. But even if it could, that oath nevertheless represents an unconstitutional Bill of Attainder.

CONCLUSION

The Appellant has attempted in the foregoing brief to examine in detail the numerous constitutional infirmities inherent in the Maryland Subversive Activities Act. For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland. For eighteen years it has had an inhibiting effect on the State's educational system. For eighteen years it has infringed upon rights guaranteed by the Fourteenth Amendment of the United States Constitution. The time has finally come for its demise.

Since its enactment the Act and the oath required pursuant to it have stood on such shaky underpinnings as the *Gerende* decision, a brief *per curiam;* the *Adler* decision and the privilege-right dichotomy, both recently discredited as a basis for constitutional doctrine. The decisions of this Court have consistently eaten away at these underpinnings.

The attempts by the Attorney General of Maryland to modify the legislative enactment administratively can in no way insulate the enactment from judicial attack. The Act continues to stand and the oaths continue to be administered under the authority provided in the Act and nowhere else. The Act, all of its provisions interconnected through its definitional section, and the oath required under it are broad; they are vague; they are indefinite. Together they infringe on academic freedom and freedom of speech, association, conscience and belief. Together they deny procedural due process of law. Together they constitute a Bill of Attainder. Together they violate the relevant provisions of the Constitution as interpreted by this Court. The Appellant therefore respectfully requests that this Court declare the Maryland Subversive Activities Law, Art. 85A, Md. Code Annot. (1957), particularly its definitional and loyalty provisions, and the "Certification of Applicant for Public Employment" unconstitutional; and that the case be remanded to the District Court with instructions to enter an appropriate order enjoining the Appellees from enforc-

ing the statute and the "Certification," and granting other necessary relief, including back wages, see, *e.g., Bond* v. *Floyd,* 385 U. S. 116, 128 n. 4; *Bomar* v. *Keyes,* 162 F. 2d 136 (2d Cir. 1947), *cert. denied,* 332 U. S. 825, to the Appellant.

Respectfully submitted,

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202

*Of Counsel**

August, 1967

---

* Counsel for the Appellant are indebted to Mr. W. Taylor Brown, of the University of Maryland School of Law, Class of 1968, for his assistance in preparing this brief, and to the Law Students Civil Rights Research Council which made his services available.